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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1949

No. 549

In Bankruptcy

In the Matter of:

ERNEST NEWTON KALB,

Debtor,

ERNEST NEWTON KALB,

Petitioner,

vs.

HENRY FEUERSTEIN and HELEN FEUERSTEIN, Secured Creditors, and OSCAR JACOBSON, Trustee,

Respondents.

RESPONDENTS' BRIEF
In Opposition To Petition For Writ Of Certiorari

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MILWAUKEE

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RESPONDENTS' BRIEF

In Opposition To Petition For Writ Of Certiorari

STATEMENT OF FACTS

The statement of facts in the Petitioner's brief, (Pages 3 and 4), are substantially correct.

Counsel believes, however, that a brief statement of the history of this litigation may be helpful.

This litigation arises out of the execution of two promissory notes by the Petitioner, payable to the Respondents, Henry and Helen Feuerstein, in the amount of Six Thousand ($6000.00) Dollars, dated March 6, 1923, and secured by a first mortgage on the farm which is the subject matter of this litigation.

Foreclosure of that mortgage was commenced on the 9th day of March, 1933, and a judgment of foreclosure and sale was rendered on the 21st day of April, 1933, by the County Court of Walworth County, Wisconsin, in the amount of Six Thousand ($6000.00) Dollars principal, interest in the amount of Twelve Hundred Thirty-two and 57/100 ($1232.57) Dollars, Two Hundred Eighty ($280.00) Dollars attorney fees, and costs and disbursements of Eighty-seven and 28/100 ($87.28) Dollars. The record shows that the taxes on the premises were then delinquent in the amount of about Seven Hundred ($700.00) Dollars.

The Petitioner availed himself of the then moratorium Statutes of the State of Wisconsin, with the result that sale of the premises was deferred until October 25, 1934.

On October 25, 1934, an order was entered staying the proceedings in the County Court of Walworth County because of the fact that the Petitioner had filed a petition in the District Court under the so-called Frazier-Lemke Act.

A meeting of creditors was held subsequently, but no further proceedings were had under the so-called Frazier-Lemke Act, and on July 20, 1935, pursuant to an order previously entered, the sale was held, and the premises conveyed to Henry Feuerstein, one of the Respondents. A Sheriff's Deed was executed and delivered, but at the request of the Petitioner, confirmation of the

sale was delayed until September 16, 1935, when an order confirming the sale was entered.

Prior to that time, and on the 27th day of June, 1935, an order was entered in the District Court, dismissing the Petitioner's petition because of the unconstitutionality of the original Frazier-Lemke Act. On September 6, 1935, an order was entered in the District Court reinstating the Petitioner's petition as of October 2, 1934.

On March 12, 1936, a Writ of Assistance was duly executed by the Sheriff of Walworth County, and the Respondent, Henry Feuerstein was placed in possession of the farm.

On March 17, 1936, an order was entered in the District Court, dismissing the Petitioner's petition. Thereafter, the Petitioner started two actions in the State Courts, one praying for judgment expunging the Sheriff's Deed, and restoring the Petitioner to possession of his farm, and the other for damages against the Judge who granted the Writ of Assistance, the Sheriff who executed the same, and the Respondents for the loss of use of the farm, assault, and for false imprisonment. Both of these cases were decided in favor of the Respondents and the other defendants, and against the Petitioner, and the lower Court was affirmed by the Supreme Court of the State of Wisconsin. On a subsequent appeal to the Supreme Court of the United States, it was held that the mere filing of a petition under the so-called Frazier-Lemke Act conferred exclusive jurisdiction upon the Federal Courts, and ousted all other Courts of the power to maintain and enforce foreclosure proceedings, and the case was remanded to the Supreme Court of the State of Wisconsin for further proceedings. *Kalb v. Feuerstein,* 308 U.S. 433; 60 S.Ct. 343; 84 L.Ed. 370.

Thereafter, the action in which the Petitioner sought to recover damages was tried in the Circuit Court for Walworth County, and a directed verdict in favor of the Respondents and others was granted. Upon appeal to the Supreme Court of the State of Wisconsin, on December 2, 1941, *Kalb v. Luce,* 239 Wis. 256, the action of the State Court was affirmed.

On March 18, 1940, the Petitioner filed an amended petition requesting the reinstatement of the petition by him filed on October 2, 1934, and moved for rehearing of the order of dismissal entered March 17, 1936.

The Honorable F. Ryan Duffy, District Judge, refused to reinstate such proceedings, and denied the motion for rehearing; In *re Kalb,* 54 F.Supp. 535. The decision of the District Court was affirmed by this Court, 116 F. 2d 775, and certiorari was denied, 313 U.S. 568, 61 S.Ct. 940, 85 L.Ed. 1526.

A new petition listing substantially the same assets and creditors was then filed in the District Court on May 28, 1941. A motion was made by the Respondents to strike the real estate from the schedule. That motion was denied by the District Court, which decision was affirmed by the Circuit Court of Appeals, 7 Cir., 127 F. 2d 509.

The farmer debtor thereupon was adjudicated under Section 75, Sub. (s) of the Bankruptcy Act of April 2, 1943. The Conciliation Commissioner entered an order fixing the annual rental, and entered an order staying the proceedings for a period of three (3) years, conditioned upon the payment of that rental.

Following the expiration of the three year stay, the secured creditors moved for the appointment of a trustee, and for an order directing the sale of the mortgaged premises.

The farmer debtor filed a petition asking that the Conciliation Commissioner find that redemption had been made; that the mortgage in question was usurious; and for an accounting.

A formal hearing was had, testimony was taken, and the Conciliation Commissioner thereafter made the findings, and entered the orders which are now before the Court for review.

The Conciliation Commissioner in his order dated June 22, 1948, and concerning which, a petition for review has been filed by the farmer debtor, made the following findings:

(a) That the three-year stay proceedings expired on April 1, 1947. (R-62)

(b) That redemption of the mortgaged premises was not made within the three-year period. (R-62)

(c) That the reasonable rental value of the farm during the period that the secured creditors were in possession, including interest, was Nine Thousand Two Hundred Forty-eight and 40/100 ($9,248.40) Dollars. (R-62)

(d) That the secured creditors properly tilled and cared for the soil and said farm while they were in possession. (R-63)

(e) That certain repairs made by the secured creditors did not damage the barn on said farm. (R-63)

(f) That the claim of the farmer debtor that he sustained damage by being compelled to sell certain personalty was not supported by the records and was speculative. (R-63)

(g) That there was no evidence in the record to support a finding that the farmer debtor had sus-

tained any damage to his health by reason of any act or omission of the secured creditors. (R-63)

(h) That the farmer debtor is not entitled to recover attorney fees expended by him. (R-64)

(i) That there is due upon the judgment of foreclosure including interest, the sum of Fourteen Thousand Five Hundred Five ($14,505.00) Dollars. (R-64)

(j) That there is due to the secured creditors for real estate taxes paid by them, including interest, the sum of Three Thousand Five Hundred Ninety-five and 26/100 ($3,595.26) Dollars. (R-64)

(k) That there is due to the secured creditors for fire insurance premiums paid by them, including interest, the sum of Two Hundred Sixty-one and 08/100 ($261.08) Dollars, and for necessary repairs to preserve and maintain said farm, the sum of One Thousand Four Hundred Forty and 86/100 ($1,440.86) Dollars, and for general repairs, the sum of One Thousand Nine Hundred Sixty-seven and no/100 ($1,967.00) Dollars. (R-64, 65)

(l) That the net balance due to the secured creditors after allowing an offset to the farmer debtor, is the sum of Twelve Thousand Five Hundred Twenty-one and 25/100 ($12,521.25) Dollars. (R-65)

The findings of the Conciliation Commissioner were reviewed and confirmed by the District Court, Honorable F. Ryan Duffy, presiding.

On appeal to the Circuit Court of Appeals, the judgment of the District Court was affirmed.

SUMMARY OF ARGUMENT

I.

Redemption of the real estate was not timely made in view of the failure of the farmer debtor to pay into Court, the appraised value of the real estate in cash prior to expiration of the three year period provided for in Section 203 (s).

II.

Interest on the secured claim of Henry and Helen Feuerstein was properly allowed in order to determine the total sum due to the secured creditors.

III.

The Conciliation Commissioner did not err in denying the farmer debtor damages because of the repair of the barn on the premises in question, or in denying the farmer debtor damages arising out of the sale and re-purchase of certain personal property, and his findings are amply supported by the evidence.

IV.

A portion of the farmer debtor's claim is predicated upon an alleged false imprisonment which occurred on March 12, 1936. Such a cause of action, if one existed, is barred under Section 330.19(5) of the Wisconsin Statutes which provides that actions to recover damages for injuries to the person must be commenced in six years. Furthermore, this phase of the matter was fully litigated in the State Courts.

V.

No evidence was tendered upon which the Conciliation Commissioner could have based an award for attorney fees and litigation expense.

VI.

The mortgagee, while in possession, was required to make expenditures for necessary repairs, insurance, and taxes in order to preserve the premises, and was entitled to credit for those expenditures in the accounting between the parties.

VII.

The Conciliation Commissioner properly found that the reasonable rental value of the property while the mortgagees were in possession should be offset against the gross amount due from the farmer debtor to the mortgagees.

VIII.

A Conciliation Commissioner has the same jurisdiction and authority as a general referee, and in addition, the powers conferred upon them by Section 75. That the Conciliation Commissioner had the power to appoint a trustee necessarily follows.

IX.

The note and mortgage were not usurious. Added interest, costs and attorney fees maturing after default are not interest, but a penalty and do not render a note and mortgage otherwise valid, usurious.

X.

The findings of the Conciliation Commissioner were upon questions of fact, and must be sustained unless they are clearly erroneous.

ARGUMENT

I.

Redemption of the Real Estate Was Not Timely Made.

The contention of the farmer debtor that redemption was timely made is without merit.

The facts concerning the purported redemption are not disputed. On March 28, 1947, the farmer debtor paid to the Conciliation Commissioner the sum of $5300.00 and filed what purported to be an assignment of the proceeds of a loan to be consummated in the future. The assignment was not signed by the farmer debtor's wife, or consented to by the proposed mortgagee, the National Farm Loan Association of Janesville, Wisconsin. Attached to the assignment was a letter reading as follows:

"National Farm Loan Association

Janesville, Wisconsin
March 28, 1947

Mr. George Belton
Conciliation Commissioner
Elkhorn, Wisconsin
Dear Mr. Belton:

Mr. Ernest Kalb has made an application for a Federal Land Bank loan and has obtained a Federal Land Bank Loan in the amount of $7,000.00, with the instructions 'pay liens on security offered, outside financing permitted—not to exceed $2,000.00.' Mr. Kalb has called at the office and informs me

that he will be able to use the commitment which the Federal Land Bank has offered him and that he has sufficient resources to make up the difference and comply with the Land Bank's commitment. When you will arrange to furnish us with the abstract continued to date, we will be in a position to furnish Mr. Kalb with the proceeds of his loan.

Yours very truly,

(Signed)

J. M. BARRY
Secretary-Treasurer"

The assignment was not irrevocable. Neither was the commitment of the National Farm Loan Association. In fact, the original commitment was cancelled on October 24, 1947. It is contended that the commitment has been reinstated although the record does not show that fact.

The making of such assignment did not constitute a redemption of the mortgaged premises.

The specific language of Section 75 (s) (3) provides:

"At the end of three years, or prior thereto, the debtor may pay into Court the amount of the appraised value of the property of which he retains possession, including the amount of encumbrances, on his exemptions, up to the amount of the appraisal, less the amount paid on principal."

The language of the Act is clear and mandatory, and is capable of only one construction, and that is, that the farmer debtor must pay the appraised value into court, in cash or its equivalent. The farmer debtor had three years in which to arrange his financing. He was not required to wait until the last day of the redemption period

to do so. The assignment of the proceeds of a mortgage that might never be executed is not a compliance with either the letter or the intent of the quoted section.

In the case of *In re Nellies,* 61 F. Supp. 796, the farmer debtor deposited the amount of the appraised value of the real estate in a bank pending delivery of a deed.

The court in holding that redemption had not been made, said,

> "The statute is clear to the effect that in order to entitle the debtor to a redemption the debtor must 'pay into court the amount of the appraisal.' If the debtor complies with the requirement of the statute 'the court shall, by an order, turn over full possession and title of said property, free and clear of encumbrances to the debtor.' That is, under the statute the debtor pays the money into court and secures title by an order of the court. In the present instance the debtor has paid no money into court. The court is advised that she has arranged an outside escrow for an amount equal to an appraisal of a portion of the property of which she retained possession. She asks not title through an order of the court but instead demands a conveyance directly from the secured creditor and also title insurance.
>
> * * *
>
> In any event neither the letter nor the spirit of the law would justify this court in giving to this bankrupt the right to so materially amend the statute as to allow her to substitute 'an escrow holder' for the court and to demand title insurance from the secured creditor rather than title through court order as specified by the statute. To permit this bankrupt to so substantially amend the statute would establish a precedent for increasing departures from the statute by subsequent farmer-debtors. Some later farmer debtor instead of selecting a bank as escrow holder

might designate some individual, contending that he should have as much right to designate his escrow holder as the instant bankrupt should to designate hers. In any event it is Congress rather than the bankrupt of this court which has the sole power to amend the statute. The present requirement that the money be paid into court is definite and positive.

No money having been paid into court and the farmer debtor having demanded a conveyance of the real estate and title insurance from the creditor rather than by court order, this court must hold that the bankrupt is not entitled to the real property."

The rule stated is applicable here. It is obvious that redemption was not made.

II.

Interest on the Claim of Henry and Helen Feuerstein, Secured Creditors, Was Properly Allowed.

The conciliation commissioner did not err in allowing interest on the claim of the secured creditor.

A verified claim was duly and timely filed covering the principal sum of the foreclosure judgment plus interest; taxes paid by the mortgagee, including interest; repairs and improvements, made by the mortgagee, and insurance premiums paid to protect the property.

The proceeding sought to be reviewed was in part an accounting requested by this mortgage debtor, for the purpose of determining the net amount due to the secured creditors. The conciliation commissioner allowed both parties, both the farmer debtor and the secured creditor interest on their respective claims. It is not contended by the secured creditors that they can recover more than the appraised value of the farm if the farmer debtor

makes redemption as provided for in the order of the conciliation commissioner. Nor is it contended by them that they have any claim against any of the assets of the bankrupt estate except the real estate in question.

It will not be seriously urged that the value of the real estate is less than the net amount due to the secured creditors.

That the conciliation commissioner did not err in allowing interest on the secured creditors claim is clearly established by prior adjudications.

In (2) Rem. Bankruptcy, at P. 434, it is stated,

> "It has never been suggested that a creditor is not entitled to interest accruing up to the very date of the payment to him of the proceeds of his security if the proceeds are sufficient to satisfy his entire claim. Any other result would involve the destruction in part of valid liens."

This rule is supported by the case of *People's Homestead Association v. Bartlette,* 33 F. (2nd) 561, where the court said,

> "We are of the opinion that appellant was entitled to its interest on its mortgage up to the date of the completed sale. That sale was not complete until the purchaser had complied with his bid by paying the purchase price. Section 67(d) of the Bankruptcy Act (11 U.S.C.A., Section 107) provides that liens given or accepted in good faith shall not be affected by that act. In Coder v. Arts, 152 F. 943, 15 L.R.A. (N.S.) 372, the Circuit Court of Appeals for the Eighth Circuit, in an opinion by Judge Sanborn, held that, 'where a trustee sells mortgaged property of the bankrupt's estate free of the mortgage, and the proceeds of the sale are sufficient for that purpose, the mortgagee is entitled to payment of interest

upon his mortgage debt as well as the principal, out of the proceeds in accordance with the terms of the note and mortgage.'

In support of that ruling, Thompson v. Fairbanks, 196 U.S. 516, 25 S.Ct. 306, 49 L.Ed. 577, was cited. The Supreme Court in affirming Coder v. Arts, 213 U.S. 223, 245, 29 S.Ct. 436, 445 (53 L.Ed. 772, 16 Ann. Cas. 1008, said: 'Nor do we think the Circuit Court of Appeals erred in holding that, inasmuch as the estate was ample for that purpose, Arts was entitled to interest on his mortgage debt.' Sexton v. Dreyfus, 219, U.S. 339, 31 S.Ct. 256, 55 L.Ed. 244, relied on by appellee, is not in conflict with the view indicated by the just quoted language. In that case the secured creditors had exhausted their security, and as to the fund in court were unsecured creditors. In Coder v. Arts, as in this case, the secured creditor had not exhausted his security, and sought to be paid, not out of a general fund that belonged to the unsecured creditors, but out of a special fund derived solely from the sale of his security. See San Antonio Loan & Trust Co. v. Booth (C.C.A.) 2 F. (2nd) 590."

To the same effect are the following cases:

In re Gotham Can Co., 48 F. (2d) 540.

In re Alpine Petroleum Corp., 41 F. (2d) 682.

The mortgage judgment in question provided that the mortgagee might pay all taxes and insurance and add such sums so paid to the judgment. Consequently the inclusion of those sums by the Conciliation Commissioner in his accounting was proper.

III.

The Conciliation Commissioner Did Not Err in Denying the Farmer Debtor Damages Because of the Repair of the Barn on the Premises in Question, or in Denying the Farmer Debtor Damages Arising Out of the Sale and Re-purchase of Certain Personal Property, and His Findings Are Amply Supported by the Evidence.

The Conciliation Commissioner did not err in denying the debtor any compensation for being divested of his property other than the allowance of reasonable rental value during the time the debtor was out of possession.

The farmer debtor was entitled to have determined the reasonable rental value of the land during the time he was out of possession and this the Conciliation Commissioner did, although we feel that the value as found is excessive, in the light of the uncontradicted evidence and especially in view of the testimony given by two impartial and qualified experts. (R-50, 51, 52, 53, 54.)

The farmer debtor claimed that the barn had been damaged (R-15, 16, 17, 18, 19,) because it had been converted from a stock feeding shed and hay storage barn to a modern dairy barn.

Objection to the reception of any testimony on this subject was made on the ground that the claim involved an alleged tort which could only be determined in a judicial proceeding where the secured creditors would be entitled to a jury trial.

Even assuming that the testimony was admissible, it still falls far short of establishing that the barn was in anywise damaged. On the contrary the evidence establishes (R-42, 43, 44, 45, 46) that the value of the barn

was increased by the repair work done on it by the secured creditor. Furthermore, had it been depreciated in value, the decrease would have been reflected in a lower appraisal value.

The farmer debtor further contended that the farm had not been properly operated during the period the secured creditors were in possession and that its fertility had been destroyed, but offered no testimony to support such contention. On the contrary, the testimony of the tenant (R-46, 47) showed that the farm was operated as other farms were operated in the area, and that crops were rotated, some seeding was done every year, and commercial and natural fertilizer was applied every year.

The farmer debtor also attempted to substantiate an item of $4,077.00 (R-20, 21), purporting to be a loss arising out of the difference between personalty sold by him in 1936 and personalty purchased by him in 1944. Testimony of this character was received subject to counsel's objection. The Conciliation Commissioner found that this claim was not supported by the records in this and in the prior proceedings and is based upon mere speculation. Counsel suggests further that there is no credible evidence upon which any finding in favor of the farmer debtor could be made.

There is no testimony as to relative age, condition or value of the property sold or the property purchased. Furthermore, it is a matter of common knowledge that the price of farm machinery, crops and livestock increased between 1936 and 1944, and that these items have greatly increased since 1944, so that undoubtedly the farmer debtor could sell out today at a handsome profit. The finding that this claim is based upon mere speculation is amply justified.

IV.

All Questions of Damages Arising Out of the Petitioners Alleged False Imprisonment Have Been Fully Litigated, or Are Now Outlawed by the Wisconsin Statute of Limitations.

Any claim which the Petitioner asserts for damages to his person has been fully litigated and is barred by the Wisconsin Statute of Limitation. The Petitioner introduced testimony, subject to the Respondent's objection (R-25, 39, 40, 41, 42) to support a claim for damages to his person, alleged to have been caused by confinement in the County Jail of Walworth County.

The subject matter involved in this contention was considered in *Kalb v. Luce,* et al, 231 Wis. 186, 285 N. W. 431; 234 Wis. 509, 291 N.W. 841, and was finally disposed of in 239 Wis. 256, 1 N.W. (2d) 176, and is now res adjudicata.

Even if it were not, that cause of action, having accrued on March 12, 1936, is long since outlawed under Section 330.19(5) of the Wisconsin Statutes, which reads in part as follows:

"330.19. Within six years.

(5) An action to recover damages * * * for injuries to the person * * * of another."

The Conciliation Commissioner found, in connection with this contention (R-63) that there was no evidence in the record to support a finding that the farmer debtor sustained any damage to his health by reason of any act or omission of or by the secured creditors, and further found that the question had been fully litigated.

These findings are amply supported and should be affirmed.

V.

There is No Evidence in the Record Upon Which the Conciliation Commissioner Could Base an Award to the Petitioner for Attorney Fees and Litigation Costs.

There is no evidence whatever in the record upon which the Conciliation Commissioner could base an award to the Petitioner for attorney fees and costs. It is true that a Conciliation Commissioner, referee or judge has a wide discretion in determining the amount, or the reasonableness of attorney fees to be allowed. But here there has been no showing whatever upon which the commissioner could base an award.

As a matter of fact, most of the litigation which he prosecuted was wholly unnecessary and meaningless in view of the fact that his petition, under Section 75, was dismissed on March 17, 1936, and all proceedings in the State Courts were resolved against him.

VI.

A Mortgagee in Possession is Entitled to Reimbursement for Reasonable Expenditures Made By Him to Preserve the Premises Such as Insurance, Taxes and Repairs.

The farmer debtor maintains that the conciliation commissioner erred in allowing the secured creditors credit for moneys expended in repairs on the farm in question. The testimony, (R-43, 44, 45, 46, 47, 48, 49, 50) shows that at the time the secured creditors took possession of the farm, all of the buildings were badly in need of paint. There was no cistern pump and no kitchen sink. There were no eavestroughs on the house. One hundred forty-

six (146) rods of fence had to be constructed at a cost of Two ($2.00) Dollars per rod. There was no floor in the barn. The interior of the house had to be decorated. Mr. Feuerstein, one of the secured creditors, testified that the work done on the buildings was reasonably necessary to maintain them in a good state of repair.

The general rule in Wisconsin for more than forty (40) years has been that a mortgagee in possession is entitled to reimbursement by the owner of the right of redemption for his reasonable expenditures to preserve the property, such as taxes and repairs. (*Lynch v. Ryan,* 137 Wis. 13, 118 N.W. 174.

The Conciliation Commissioner found that the secured creditors were entitled to reimbursement for taxes and insurance paid and the sum of $1440.86 expended in making repairs necessary to maintain said farm in a good state of repair.

The Conciliation Commissioner's findings were justified under the evidence.

VII.

The Sum Found as a Reasonable Rental for the Period the Secured Creditors Were in Possession Was Properly Held to Be a Credit Against the Gross Amount Due from the Petitioner.

The Petitioner apparently contends that he is to have a credit against the appraised value for the amount determined as a reasonable rental for the period the Respondents were in possession, but is not to be charged for any of the items found in favor of the Respondents by the Conciliation Commissioner.

In other words, if we correctly understand the farmer debtor's position, he contends that he is entitled in these proceedings to have all and singular his debts discharged and yet retain all or a portion of his assets.

On July 16, 1941, at 11:00 o'clock A.M. the farmer debtor filed an application for leave to amend his petition and scheduled by inserting in Schedule B-3, his unliquidated claim for damages against Henry Feuerstein and Helen Feuerstein. The application was granted.

That portion of the schedule as amended reads as follows:

> UNLIQUIDATED CLAIMS OF EVERY NATURE WITH THEIR ESTIMATED VALUE:
>
> Damages due from Henry Feuerstein and Helen Feuerstein for the unlawful eviction of the farmer debtor from the use and possession of the following described premises* on March 12, 1936, and for the unlawful use and possession of said premises from March 12, 1936, up to the present time, said Henry Feuerstein and Helen Feuerstein still remaining unlawfully in possession of said premises.
>
> *The northwest quarter of the northwest quarter and the north half of the southwest quarter of the northwest quarter of Section 14, and the northeast quarter of the northeast quarter and the north half of the southeast quarter of the northeast quarter of Section 15, all in Town 1, North, Range 15 East, Walworth County, Wisconsin, being 120 acres more or less.
>
> Said premises are the same premises as are described in Schedule A-2, being mortgaged to said Henry Feuerstein and Helen Feuerstein in the amount of $7500.00
>
> Said eviction and taking of possession was held unlawful in Kalb v. Feuerstein, 308 U.S. 433. The farmer debtor has been damaged as a direct and

proximate result of said unlawful eviction use and possession, and loss of rents and profits of said premises in the sum of $25,893.00. As said unlawful possession still continues the farmer debtor's damages necessarily continue to the time of restoration of the premises to him.

$25,893.00

The farmer debtor having been adjudicated a bankrupt, all of his assets, except those exempt by law from execution, passed into the control of the Bankruptcy Court to be dealt with as in another bankruptcy matter.

Counsel relies upon the case of *Federal Land Bank v. Morrison,* 133 Fed. (2d) P. 613.

That case is not in point. The facts in that case briefly stated are that in 1933 receivers were appointed in a state court foreclosure proceedings. In 1935, a petition was filed under Section 75 of the Bankruptcy Act. After the enactment of the present Section 75 (s) the proceedings were reinstated on Feb. 20, 1940. The receivers had been in possession during the interim and it is alleged that they had been reappointed by consent in the Bankruptcy proceedings.

The question presented was whether the receivers were entitled to retain certain crops and moneys then in their possession, or whether the farmer debtor was entitled to have those items turned over to him personally.

The court held that in view of the fact that the Bankruptcy Act made no provision for the appointment of receivers under Section 75, that such appointment, even if consented to, was invalid. The court ordered that certain moneys and crops then in the hands of the receivers be delivered to the farmer debtor and ordered

that substantially an equal amount of money be applied on the mortgage indebtedness.

But in the instant case an entirely different situation is presented. The order under review comes as the end result of an accounting to determine the net balance due to the secured creditors. Any crops or other profits arising out of the operation of the farm during the period of the stay properly belong to the farmer debtor, such being the product of his labors and the rentals he has paid.

However, causes of actions existing at the time the farmer debtor is adjudicated a bankrupt belong to the estate of the bankrupt and not to the bankrupt personally.

The right of offset in bankruptcy matters is too well established to require any citation. In the accounting before the referee, the principal question was to determine the amount owed by the Petitioner to the Respondents and vice-versa. If the result established that the Petitioner was indebted to the Respondents in a sum greater than the appraised value, then obviously all that the Respondents can recover is the appraised value. On the contrary, if the result established that the Respondents were entitled to a sum less than the appraised value, nevertheless the Petitioner would be required to pay the appraised value into court and the excess over the amount due to the Respondents would redound to the benefit of other creditors.

It follows, therefore, that the finding of the Conciliation Commissioner that there is due to the Respondents, the sum of Twelve Thousand Five Hundred Twenty-one and 25/100 ($12,521.25) Dollars is correct and should be sustained.

VIII.

The Conciliation Commissioner Had the Power to Appoint a Trustee.

There can be no doubt but that the conciliation commissioner has the power to appoint a trustee under Section 75(s)(3). Section 75(s)(3) provides that,

> "If, however, the debtor at any time fails to comply with the provisions of this section, or is unable to refinance himself within three years, the Court may order the appointment of a trustee, and order the property sold or otherwise disposed of as provided for in this Act."

The authorities are in agreement that a Conciliation Commissioner after a general reference of a proceedings to him, may exercise all the powers of the Court under Section 75, except such as are required to be exercised by the judge.

Remington, Vol. 10, P. 18-19

In re Wiedmer, 82 F. 2nd 566

General Order, L (11)

Adair v. Bank of America, 303 U.S. 350

The Sixth Circuit has held that commissioners are clearly referees and have the same jurisdiction and authority as general referees and in addition the powers conferred on them by Section 75, saying as follows:

> "Federal Land Bank v. Castanien, 116 F. 2d 289, 45 ABR (NS) 176 (1941; CCA 6th) Simons, Circuit Judge:
>
> It would seem to be clear, from consideration of the foregoing sections, that except where otherwise specifically provided, a conciliation commissioner is

clothed by the Act with all the jurisdiction and powers of a referee, and that whatever the court may do, the commissioner may do, unless the power to be exercised is conferred not upon the court as such, but upon the judge. There is nothing novel in this concept. Within the meaning of old sections 23(b) and 60(b), 'Courts' are taken to include the referee, MacDonald v. Plymouth County Trust Co., 286 US 263, 268, 76 L. Ed. 1093, 1905, 52 S. Ct. 505, 20 ABR (NS) 255 (CCA 2). A conciliation commissioner is clearly a referee. While he is a particular kind of a referee, and while to him are referred the supervision and liquidation of the estates of farmer-debtors only, it would seem that within such limits he exercises all of the jurisdiction and authority with which general referees are clothed."

"The case of In re Ashworth, 31 F. Supp. 52, 45 ABR (NS) 441 (1938; DC Ill) is in accord with this view. While in that case emphasis was placed upon a local rule of court, it would seem that the order of reference in the present case is even broader than the rule there applied, and it should also be noted that decision was rendered before the Chandler Act became effective, more particularly defining by Sec. 38 the jurisdiction of the referee."

It follows that the Conciliation Commissioner had ample authority to appoint a trustee.

IX.

The Note and Mortgage Constituting the Basic Subject matter of This Controversy Were Not Usurious.

It is true that the conciliation commissioner failed to rule expressly that the note and mortgage were not usurious. However, his failure to make any finding is in effect a ruling adverse to the farmer debtor.

The mortgage in question is the standard form of mortgage that has been in general use in Wisconsin for more than twenty-five years in the personal knowledge of the writer. It provided that in the event of the failure of the mortgagor to pay the taxes, or to keep the premises insured, the mortgagee might pay such taxes and insurance premiums, in which event, moneys so paid would be added to the principal and thereafter draw interest at ten per cent per annum and become a lien on the premises. It also provided that the past due interest would draw interest after becoming past due at a like rate. The mortgage note bore interest at the rate of five per cent per annum.

That such a mortgage is not usurious is beyond doubt. In *Randall v. Home Loan and Investment Co.*, 244 Wis. 623, 12 N.W. (2d) 915, the court considered a situation involving an installment contract, carrying interest at 9.8%, and providing for interest of one per cent per month on delinquent monthly installments.

The court reviewed several early Wisconsin cases, and, in holding that the contract was not usurious, said in part as follows:

> "In the Restatement, 2 Contracts, P. 2037, Sec. 536, the rule is stated as follows: "Unless especially forbidden by statute a provision in a bargain for a loan that after maturity interest at a higher rate shall be charged than is permissible before maturity, does not render the bargain usurious unless the parties when entering into it contemplate that the loan shall not be paid at maturity."
>
> Under Comment A, it is stated: "A provision within the rule stated in this Section is held to be inserted for the purpose of compelling payment at maturity and not to be bargained for in return for the use of the money, and therefore the provision is not illegal."

In 27 R.C.L. 232, Sec. 33, the rule is stated as follows: "Where a borrower has agreed to pay a rate of interest not forbidden by law, but has stipulated that, in the event of his not making payment at the time specified, the obligation shall bear a higher rate of interest, either from default or from the date of its execution, or that some specific sum shall be paid in addition to the principal and interest contracted for, the increased rate is generally regarded as a penalty, and not within the usuary laws." To same effect see State Mut. Rodded Fire Ins. Co. v. Randall, 232 Mich, 210, 205 N.W. 165, 41 A.L.R. 973; Ramsey v. Morrison, 29 N.J.L. 591, Funk v. Buck, 91 Ill. 575, 577; Diehl v. Becker, 227 N.Y. 319, 324, 125 N.E. 533, 534."

In the instant case, the added interest became effective, only upon default, and constitutes a penalty for default, not interest, and is not usurious.

X.

The Conciliation Commissioner's Finding Upon Questions of Fact Must Be Sustained Unless Those Findings Are Contrary to the Clear Weight of the Evidence.

Substantially all of the conciliation commissioner's findings were upon questions of fact and should be sustained unless those findings are contrary to the clear weight of the evidence.

General Order XLVII provides that:

"Unless otherwise directed in the order of reference the report of a referee or of a special master shall set forth his findings of fact and conclusions of law, and the judge shall accept his findings of fact unless clearly erroneous * * * "

Even if the findings are incomplete, there is a presumption that the referee acted rightly. Vol. 8, Rem. Bankruptcy P. 32.

In the instant case the Petitioner was given a full and complete hearing before the conciliation commissioner. Great latitude was allowed him in the introduction of evidence. Evidence patently incompetent was permitted to enter the record over Respondents' objection. The conciliation commissioner saw and heard the witnesses and had an opportunity to evaluate their testimony and their interest or bias.

His findings have been affirmed by an able and experienced District Judge.

The duties of a conciliation commissioner and the reviewing judge were summarized in *Kauk v. Anderson,* 137 F. 2d 331, (Eighth Circuit) where Judge Sanborn said:

> "The conciliation commissioner in a case such as this is the trier of the issue of value and is acting as a referee. His findings of fact must be accepted upon review unless clearly erroneous. They are clearly erroneous if they are based upon a substantial error in the proceedings or upon a misapplication of the controlling law, or if they are unsupported by any substantial evidence, or if they are contrary to the clear weight of all the evidence. Dunsdon v. Federal Land Bank of St. Paul, supra. The duty and responsibility of the conciliation commissioner is to impartially and competently try the issue of value upon the lawful evidence adduced by the parties, to fairly appraise the credibility of the witnesses and the weight of their evidence, and, upon the basis of the competent, credible evidence, to soundly determine the issue tried. The function of the district judge, in reviewing the determination of the conciliation commissioner, is to ascertain (1) whether a

fair hearing was accorded, (2) whether all competent evidence offered was received and considered, (3) whether any incompetent evidence was received and relied upon, (4) whether there was substantial competent evidence to support the determination, and (5) whether it is contrary to the clear weight of all of the competent evidence adduced.

The district judge may not try the issue de novo upon the record and substitute his judgment of value for that of the conciliation commissioner. Dunsdon v. Federal Land Bank of St. Paul, supra. If the parties were accorded a fair hearing by the commissioner, if no prejudicial error was committed by him, if all competent evidence was considered, and no incompetent evidence was relied upon, and if he reached a determination justified by the evidence, his determination is, ordinarily, conclusive. This does not mean that, on review, the district judge is required to blindly and literally accept as substantial the testimony of expert witnesses which is opposed to physical facts or to common knowledge or to the dictates of common sense or which is obviously based upon pure speculation. Svenson v. Mutual Life Ins. Co. of New York, 8 Cir., 87 V. 2d 441, 445, and cases cited. It does mean that substantial, competent, and credible evidence, adduced before the commissioner, which supports his determination, may not be disregarded by the district judge upon review."

A cursory reading of the evidence will establish that the conciliation commissioner's findings are clearly supported by the evidence, were affirmed in the District Court, and should be affirmed here.

CONCLUSION

It is respectfully submitted that the judgment of the Circuit Court of Appeals should be affirmed in all respects.

This matter has been in litigation since March, 1933, a period of more than sixteen years. The secured creditors have been put to prolonged expense and litigation in an effort to recoup a portion of their life's savings loaned to the farmer debtor in good faith in 1923.

The farmer debtor has now been accorded the full and complete protection of this legislation. He had three years in which to refinance himself, yet he waited until three (3) days before the end of that period to make a purported and defective attempt at redemption. He has been given a full and complete hearing and every opportunity to assert any and every claim.

It is now time that the rights of the secured creditors be recognized by the sale of the farm in question and the speedy termination of this proceedings.

Respectfully submitted,

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